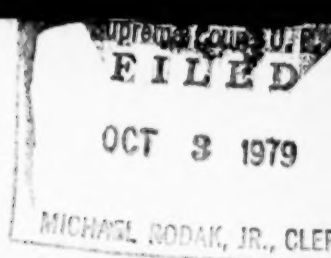


No. 79-189



In the Supreme Court of the United States

OCTOBER TERM, 1979

ANGELO JOSEPH MERCURIO, RICHARD FLORAMO,
PHILIP V. CORSO AND BURTON RHODES, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINION BELOW

The court of appeals affirmed petitioners' convictions by unreported judgment orders (Pet. App. 33-40).

JURISDICTION

The judgment orders of the court of appeals were entered on June 11, 1979. The petition was filed on August 4, 1979¹ and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹Petitioners attempted to file an application for an extension of time within which to file a petition for a writ of certiorari. The application was returned to petitioners on July 20, 1979, because it was filed out of time under Rule 34(2) of the Rules of this Court.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence of petitioners' participation in the conspiracy so that a co-conspirator's statements were properly admitted into evidence.

2. Whether probable cause supported the arrests of petitioners Corso and Floramo, thereby authorizing the searches incident to their arrests.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of transporting counterfeit securities in interstate commerce in violation of 18 U.S.C. 2314, of selling counterfeit securities in violation of 18 U.S.C. 2315, and of conspiracy to commit those offenses in violation of 18 U.S.C. 371. Additionally, petitioner Corso was convicted of possessing a firearm after conviction of a felony, in violation of 18 U.S.C. App. 1202(a)(1), and of carrying a firearm while committing a felony, in violation of 18 U.S.C. 924(c); petitioner Floramo was also convicted of transporting a firearm with an altered serial number, in violation of 18 U.S.C. 922(k), and of carrying a firearm while committing a felony, in violation of 18 U.S.C. 924(c). Each petitioner was sentenced to five years' imprisonment on the conspiracy count and to a consecutive ten-year term of imprisonment on the counterfeit security count.² The court of appeals affirmed by judgment orders (Pet. App. 33-40).

1. The evidence is not in dispute. It shows that an undercover FBI agent met with co-defendant Robert Winston on July 26, 1977, near Pittsburgh, Pennsylvania,

²Petitioners Mercurio and Rhodes also received two concurrent ten-year prison terms each. Petitioner Floramo received an additional five-year concurrent term of imprisonment, and petitioner Corso received an additional two-year concurrent term of imprisonment.

and discussed with him the possibility of purchasing counterfeit securities (Tr. 33-34, 59-60).³ Winston told the agent that he could deliver counterfeit securities and that he would sell them for 30% of their face value (Tr. 104, 112, 136-147).

Winston and the agent met again on August 26, 1977 in Fort Lauderdale, Florida, to check sample securities (Tr. 166, 545). At this meeting, Winston recommended that the agent purchase duplicate, rather than stolen, securities because they were more difficult for authorities to trace (Tr. 170-173).

Winston next met with the agent on August 30, 1977, in Pittsburgh, where he told the agent that he had 28 million dollars worth of duplicate securities (Tr. 174, 179, 181-184). Winston showed the agent a blank income certificate and a photocopy of an original income certificate of the Putnam Income Fund (Tr. 213-216, 239-248). The agent agreed to purchase the certificates (Tr. 254). Winston stated that when he brought the securities to Pittsburgh, he was going to bring an "army" with him (Tr. 183), and he later stated that he would have four of his "buddies" with him because he had to watch out for his "hoodlum friends" (Tr. 185).

On September 6, 1977, Winston returned to Pittsburgh and met with the agent to set up the sale of the securities (Tr. 267-271, 546). On September 7, 1977, the agent took Winston to a bank and showed him one million dollars in cash in a safety deposit box (Tr. 279-281). On the morning of September 8, Winston and petitioner Rhodes rented safety deposit boxes at different banks (Tr. 663-664, 985-998, 1359-1364). Winston had rented two rooms

³"Tr." refers to the transcript pages. The original record was not available for the preparation of this opposition. Record references are based on those supplied in the briefs filed in the court of appeals.

at the Hilton Hotel, Rooms 1205 and 1209 (Tr. 663-664). After Winston and Rhodes returned to those rooms, Winston contacted the agent and told him to come to the hotel at 11:30 a.m. (Tr. 284).

When the undercover agent went to the hotel to meet with Winston, several other agents began to look around the hotel lobby to see if they could identify Winston's bodyguards (Tr. 287, 295-296, 549). The agents first noticed petitioner Mercurio because, as soon as he saw them, he turned abruptly and looked into a display window (Tr. 296, 550). The agents also noticed petitioner Corso when he too turned abruptly as they passed (Tr. 297-298, 552). The agents also noticed a third individual in a green jacket who turned suddenly to study a blank wall as the agents approached (Tr. 300-301, 553-554). At this point, the agents entered a restroom and broadcast descriptions of the men they had noticed. When they left the restroom they again saw the individual in the green jacket who again avoided eye contact with the agents by picking up a pamphlet from a display stand (Tr. 302-303, 555-556). The agents proceeded toward the hotel restaurant and again observed petitioners Mercurio and Corso, who turned suddenly to face away from them (Tr. 302-306, 556-558).

When the agents returned to the hotel lobby, they saw petitioners Corso, Mercurio, and Floramo sitting together (Tr. 312-313, 562). The agents crossed the lobby and sat down; and when one of them next looked back, he saw that Floramo and Mercurio had stationed themselves at the top of a stairwell (315-317, 563-564). When the agent looked directly at them, they jumped out of his line of sight (Tr. 316-317). Winston then entered the lobby with a briefcase and was arrested (Tr. 327, 567-568, 659). The briefcase seized from Winston contained 94 counterfeit securities of the Putnam Income Fund with a face value

of nearly 23 million dollars (Tr. 1082-1088). As Winston was arrested, an agent looked to the top of a flight of stairs and saw petitioner Floramo push petitioner Mercurio quickly out of the agent's line of sight (Tr. 568-569). The agent left the hotel lobby to search for other agents to assist him, and when he returned to the lobby, he saw the individual in the green jacket and petitioners Corso, Mercurio and Floramo talking together near the hotel registration desk (Tr. 570-571). The agent left the hotel by a back entrance and went to the side of the building where he saw petitioners Floramo and Corso at the taxi stand (Tr. 571-573). He heard Corso ask Floramo, "What's going on?", and Floramo answer, "I don't know." (Tr. 573). Meanwhile, petitioner Mercurio stood in the middle of the street craning his neck to watch the agents take Winston to a car (Tr. 573-574). At this point, the other agents arrived and arrested petitioners Corso and Floramo in a taxi and petitioner Mercurio on the street (Tr. 574-575, 706, 728, 764). The agents discovered a .32 caliber revolver on petitioner Corso's person and .38 caliber and .357 caliber handguns on petitioner Floramo (Tr. 712-714, 733-737, 749-750). Petitioner Floramo also carried a flight bag that contained surgical gloves and three boxes of ammunition, one .32 caliber, one .357 caliber, and one .38 caliber (Tr. 731-732). All of the weapons were loaded, and there were six rounds missing from each box of ammunition taken from Floramo (Tr. 713-714, 732).

At this time, Corso said he did not know Floramo and had only hitched a ride in his taxi (Tr. 752, 789-791). He claimed he was in Pittsburgh to see a hockey game (789-791). Floramo also denied knowing Corso, and stated that he found the guns in the cab and placed them in his waist band to avoid discharging them accidentally (Tr. 789-790). Mercurio also said he did not know Floramo or

Corso (Tr. 771). Petitioner Rhodes was arrested approximately one week later, and at the time of his arrest denied knowing Floramo, Corso, or Mercurio (Tr. 1056-1057).

Additional evidence at trial established a close relationship between petitioners. It revealed that Rhodes and Corso had shared an apartment in 1974 (Tr. 1068-1069). Telephone records showed numerous calls between telephones connected with Winston and petitioners Rhodes, Corso, and Mercurio during August and September 1977 (Tr. 1774-1790). Shortly after his arrival in Pittsburgh, on September 8, petitioner Mercurio was observed entering Room 1205 at the Hilton Hotel in the company of Winston (Tr. 803-806). When petitioner Mercurio was searched incident to his arrest, the agents discovered two pieces of paper. The first had petitioner Corso's name on it, the name of a hotel in the Pittsburgh area, and telephone numbers (Tr. 773-774, 803-806). Corso was shown to have rented a room at that hotel for three individuals (Tr. 1110-1114). The second piece of paper found on Mercurio had the name "Burt" on it and petitioner Rhodes' telephone number (Tr. 775, 1057). When petitioner Corso was arrested, the agents found an address book containing the name "Sonny", an alias for petitioner Mercurio (Tr. 775). Agents searched that hotel room as well as the adjoining room, and discovered a prescription bottle with petitioner Rhodes' name on it and an address book containing Rhodes' name and the name of an employee of Winston's (Tr. 876-877, 925).

Petitioners Rhodes and Mercurio testified on their own behalf at trial (Tr. 2153-2281, 2289-2389). Both testified that Rhodes had arranged for them and Corso to act as Winston's bodyguards in Pittsburgh on the day of the arrest, but both denied any knowledge of the illegal transaction in which Winston was involved.

ARGUMENT

1. Petitioners contend that Winston's statement that he was going to bring an "army" of four of his "buddies" to Pittsburgh with him was hearsay and not admissible against them because there was not sufficient independent evidence of their participation in a conspiracy. The evidence outlined above, independent of the alleged hearsay, is sufficient, however, to demonstrate petitioners' involvement in a conspiracy.⁴

The independent evidence showed that Winston agreed to sell duplicate securities for a large sum of money. On the day and place of the sale, FBI agents noticed four individuals who obviously tried to avoid being seen while watching the agents. When petitioners were arrested, two of them were armed, and they all falsely denied knowing each other and gave false explanations for their presence in Pittsburgh. One of the weapons had an obliterated serial number (Tr. 712-714, 733-737, 749-750) that would make it difficult to trace. Two of the petitioners had gloves (Tr. 731-732, 767-768) that would help them avoid leaving fingerprints. Petitioner Rhodes helped Winston to rent safety deposit boxes on the day of the sale (Tr. 663-664, 985-998, 1354-1364). Petitioner Mercurio had been seen entering Winston's room at the Hilton (Tr. 803-806), and petitioner Corso had rented a room at another Pittsburgh hotel for three individuals (Tr. 1110-1114). There were numerous telephone calls between the conspirators during the month prior to the sale (Tr. 1774-1790). Thus, there was sufficient independent evidence of petitioners' participation in the conspiracy to justify the

⁴Winston was tried with petitioners, and the challenged statements were clearly admissible against him. Fed. R. Evid. 801(d)(2)(A). Petitioners apparently do not contest that the statements were admissible at trial but claim (Pet. 21) that the court erred by not instructing the jury that they were admissible only against Winston.

trial court's admission of co-conspirator Winston's statement made in furtherance of the conspiracy. This determination was for the trial court alone, and there is no requirement that the jury be given limiting instructions on co-conspirator statements. *United States v. James*, 590 F. 2d 575, 579-590 (5th Cir. 1979) (*en banc*), cert. denied, Nos. 78-1412, 78-6369, 78-6431 (June 4, 1979); *United States v. Bell*, 573 F. 2d 1040, 1043 (8th Cir. 1978); *United States v. Stanchich*, 550 F. 2d 1294, 1297-1298 (2d Cir. 1977); *United States v. Petrozziello*, 548 F. 2d 20, 23 (1st Cir. 1977); *United States v. Trowery*, 542 F. 2d 623, 627 (3d Cir. 1976), cert. denied, 429 U.S. 1104 (1977).⁵

2. Petitioners Floramo and Corso⁶ contend that the trial court erred when it did not suppress the weapons

⁵There is a semantic difference among the circuits as to the amount of proof of participation in a conspiracy that is required before co-conspirator statements can be admitted. The First, Second, Third and Eighth Circuits have stated that the conspiracy must be proven by a preponderance of the evidence. *United States v. Bell*, *supra*, 573 F. 2d at 1044; *United States v. Petrozziello*, *supra*, 548 F. 2d at 23; *United States v. Stanchich*, *supra*, 550 F. 2d at 1298; *United States v. Trowery*, *supra*, 542 F. 2d at 627. The Fifth Circuit, on the other hand, has stated that a conspiracy must be proven by "substantial" evidence. *United States v. James*, *supra*, 590 F. 2d at 581. We do not view this difference in language as creating a conflict in the circuits of sufficient importance to merit review by this Court. In any event, this case is not appropriate to resolve this arguable conflict because the court of appeals below uses the preponderance test and thus gave petitioners the benefit of the test arguably more favorable to them. See *United States v. Trowery*, *supra*.

⁶The petition raises this claim (Pet. 21) on behalf of all petitioners. However, petitioners Mercurio and Rhodes clearly have no standing to object to the search. See *Rakas v. Illinois*, 439 U.S. 128 (1978). We further note that petitioners Mercurio and Rhodes did not raise this claim in the court of appeals and there are no unusual circumstances that would lead this Court to depart from its normal practice of refusing to consider questions not raised below. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

found during a search incident to their arrest because the arrest was not based on probable cause. The facts outlined above are, however, sufficient to justify a prudent officer's belief that an offense had been committed, so the arrests were clearly valid.

At the time of the arrests, the agents knew that Winston intended to sell a large amount of duplicate securities in the hotel that day and that he had promised to bring an "army" of "buddies" with him for protection. Armed with that knowledge, the agents observed four individuals who were obviously trying to watch them without being seen. These four individuals engaged in erratic behavior such as studying blank walls, jumping "like jackrabbits" (Supp. Tr. 74-75, 131)⁷ to avoid being seen, and pushing one another out of the agents' line of sight. The four were seen talking together, and they attempted to leave the hotel shortly after Winston was arrested. Petitioner Mercurio stood in the middle of the street and craned his neck to watch Winston as he was led to an FBI car. These circumstances more than suffice to establish probable cause to believe that the four men were the four armed bodyguards that Winston promised to bring. The Constitution does not require the agents to have warrants to arrest individuals they have probable cause to believe have committed a felony in their presence. *United States v. Watson*, 423 U.S. 411 (1976). A search incident to a lawful arrest is constitutional. See, e.g., *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752, 762-763 (1969). In this case, the search of petitioners Floramo and Corso for weapons was incident to a lawful arrest based on probable cause.

⁷"Supp. Tr." refers to the transcript of the hearing on the motion to suppress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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